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EX PARTE OR LATE FILED

February 20, 1997

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**Federal Communications Commission
Office of Secretary**

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W. Room 222
Washington, D.C. 20554

**EX PARTE: Telecommunications Services Inside Wiring
CS Docket No. 95-184**

Dear Mr. Caton:

Attached for filing in the captioned docket is a letter sent to Mark Nadel of the Commission's Universal Service Branch. In accordance with Section 1.1206(a)(1) of the Commission's Rules, two copies of this notice are being filed with the Secretary of the FCC. Please feel free to call me if you have any questions regarding this matter.

Sincerely,

Whitney Hatch

cc:

T. Boasberg
J. Casserly
J. Coltharp
D. Gonzales
M. Ginsburg
K. Levitz

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February 20, 1997

Mr. Mark Nadel
Universal Service Branch
Federal Communications Commission
2100 M Street, N.W.
Washington, D.C. 20554

Dear Mark:

As you know, the Federal-State Joint Board has recommended that the Commission adopt rules to support services offered by Information Service Providers ("ISPs") as part of the federal universal service funding mechanism. As a general matter, the Joint Board's recommendation is not consistent with the 1996 Act, FCC precedent, or pro-competitive public policy. The 1996 Act limits universal service support to "telecommunications services," and to the extent that ISPs provide "information" or "enhanced" services, they are therefore not entitled to universal service support. In its *Recommended Decision*,¹ the Joint Board attempted to make ISP services eligible for support by drawing a content-based distinction between services. There is no basis for such a distinction in the Act or in the Commission's precedent. Even if such a basis could be found, however, there is no practical way to distinguish "content" services from other services. Thus, although the goals of the Joint Board in seeking such subsidies are laudable, the better reasoned position is that Congress intended such subsidies to be limited to "telecommunications services" offered by "eligible telecommunications carriers."

I. Under the Act, Support is Limited to "Telecommunications Services."

The 1996 Act limits universal service support to telecommunications services. Indeed, "universal service" itself is defined as "an evolving level of telecommunications services."² In establishing the definition of "services" included in universal service support under subsection (c), the 1996 Act requires the FCC to consider the extent to which "such telecommunications services": (A) are essential to education, public health, or public safety; (B) have been subscribed to by a substantial majority of residential customers; (C) are being deployed in public

¹ Federal-State Joint Board on Universal Service, *Recommended Decision*, CC Docket No. 96-45, FCC No. 96J-3 (released Nov. 8, 1996) ("*Recommended Decision*").

² 47 U.S.C. § 254(c)(1) (emphasis added).

telecommunications networks by telecommunications carriers; and (D) are consistent with the public interest, convenience, and necessity.

Although subsection (c) permits the Commission to "designate additional services" for support for schools, libraries, and health care providers,³ additional "services" in this context, like the other references to "services" in this section, include only "telecommunications services" consistent with the overall definition of universal service. Even the heading of Section 254(h) indicates that universal service support is limited to "Telecommunications Services for Certain Providers." Although the Commission is granted discretion in determining which particular telecommunications services may be discounted for schools and libraries, the universe of services within which it can exercise that discretion is limited to "telecommunications services."⁴

Even with respect to advanced services, the 1996 Act makes clear that Congress did not intend the federal universal service funding mechanism to extend beyond support of "telecommunications services." The universal service statutory scheme under § 254(h)(2) permits the Commission to establish competitively neutral rules "to enhance, to the extent technically feasible and economically reasonable, access to advanced telecommunications and information services . . ." This "access to" language, however, echoes the general universal service principles section that provides that "[a]ccess to advanced telecommunications and information services should be provided in all regions of the Nation."⁵ If the "access to" language for schools and libraries can be used to justify inside wiring and Internet access, it would be difficult to deny these same services to all universal service recipients. This hardly could have been the congressional intent.

Telecommunications services that enhance access to advanced and information services are likely to be broader than those services traditionally a part of universal service. As the legislative history suggests, the Commission could conclude under this section that "dedicated data links" and other telecommunications services not traditionally part of universal service could be eligible for support.⁶ This section addresses only the promotion of "access to" information services through the provision of telecommunications services, rather than provision of information services themselves. Consequently, the statutory scheme for universal service can

³ *Id.* at § 254(c)(3).

⁴ Although the Commission may take "into account advances in telecommunications and information technologies and services" when it establishes the definition of universal service, *id.* at § 254(c)(1), the legislative history makes clear that the definition of universal service must be based on a consideration of the four criteria set forth in the subsection (c)(1). H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 131 (1996) ("Conference Report"). That is, the Commission must consider "the extent to which such telecommunications services" satisfy these four criteria.

⁵ 47 U.S.C. § 254(b)(2)

⁶ See Conference Report at 133. Contrary to the suggestion of some parties in this proceeding, therefore, universal service may be interpreted to extend only to telecommunications services without rendering subsection 254(h)(2) redundant of subsection 254(h)(1)(B).

best be understood as authorizing support (in the form of service discounts) only for telecommunications services designated as part of the universal service package for schools and libraries.

II. ISPs Provide Information or Enhanced Services, Not Telecommunications Services

By definition and FCC precedent, to the extent that ISPs offer enhanced or information services, they do not provide telecommunications services that are eligible for support. "Telecommunications services" are defined by statute as "the offering of telecommunications for a fee directly to the public. . ."⁷ "Telecommunications" is in turn defined as "the transmission, between and among points specified by the user, of information of the user's choosing, *without change in the form or content* of the information as sent and received."⁸

In contrast, "information services" are defined by the Act as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunication, and includes electronic publishing. . . ." 47 U.S.C. § 153(41). Internet access service is an "information service" because it has the capability to store, transform, retrieve, and utilize information. By performing a protocol conversion on all transmissions, Internet access providers "transform" information from asynchronous protocol to TCP-IP. Moreover, the very core of the Internet and its associated services is the ability to "retrieve" and "utilize" information.

As the Commission stated in its Non-Accounting Safeguards proceeding, there is no reason to believe that Congress in adopting its definition of "information services" discussed above intended to depart significantly from the FCC's long-standing regulatory definition of "enhanced services".⁹ The Commission's regulations define "enhanced services" as:

services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol, or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information. Enhanced services are not regulated under title II of the Act.

⁷ 47 U.S.C. § 153(51).

⁸ *Id.* at § 153(48). (emphasis added).

⁹ Implementation of the Non-Accounting Safeguards of Sections 271 and 272, CC. Docket No. 96-149, FCC 96-489 (rel. Dec. 24, 1996) at ¶102-03.

47 C.F.R. § 64.702. As discussed, Internet access, by providing a net protocol conversion (from asynchronous to TCP-IP) and permitting subscriber interaction with stored information, clearly falls under this definitional rubric as well.

Recent Commission pronouncements have confirmed that ISPs provide information services.¹⁰ As the Access Charge NPRM observed, "[t]he category of enhanced services, . . . includes access to the Internet . . .".¹¹ The Non-Accounting Safeguards Order similarly concluded that both protocol conversion and protocol processing services are "information services" under the Act.¹² The Joint Board agreed, noting that Internet Access Providers provide "information services" under the Act and are therefore not required to contribute to the Universal Service Fund.¹³ Thus Commission precedent confirms that Internet Access Providers provide information services.

III. The Joint Board Erred in Attempting to Craft a Content-Based Definition for Information Services.

In an effort to avoid the statutory language, the Joint Board attempted to base support for Internet services on a new distinction based on the level of content in a given service. Specifically, the Joint Board determined that discounts should apply "to basic conduit, i.e. non-content access from the school or library to the backbone Internet network."¹⁴ Distinguishing between services based on content level has no basis in FCC precedent and Congress failed to evidence any intent to create such a new standard. Neither the definition of enhanced services nor the statutory definition of "information services" support the Joint Board's effort to draw a distinction based on content level.

In fact, the Commission rejected just such a content-based analysis in its Non-Accounting Safeguards Proceeding. There, the FCC found that "information services" require only that a service transform or process "information." Noting that the definition of "information services"

¹⁰ While all of the services the Commission previously considered to be "enhanced services" are "information services," not all "information services" are "enhanced services." The Commission explained that "'enhanced services' under Commission precedent are limited to services 'offered over common carrier transmission facilities used in interstate communications,' whereas 'information services' may be provided more broadly, 'via telecommunications.'" Id. at ¶103.

¹¹ Access Reform at ¶ 284; The Access Charge Notice also observed that the definition of information services contained in the Act closely resembles the traditional definition of enhanced services.

¹² Non-Accounting Safeguards Order at ¶ 104.

¹³ Recommended Decision at ¶790.

¹⁴ Recommended Decision at ¶463.

does not refer to content, the agency rejected the argument that information services only refers to services that transform or process the content of information transmitted by an end-user.¹⁵

Content level distinctions would also be extremely difficult to define and implement from a practical standpoint. All ISPs provide some level of content either through browsers, advertising or other features. For example, a basic Internet service provider in Washington D.C., Erol's, offers low cost, "bare bones" access to the Internet. Even Erol's "bare bones" service, however, provides a number of content features. For instance, its home page provides advertising and links to other networks that Erol's has selected as the most potentially useful for new users. In addition, Erol's includes the Erol's Market Street Directory and a link to the Washington Post. Erol's basic package also provides the Netscape Navigator which is a distinct product from other browsers and necessarily defines the type of content a user may obtain. This package of Erol's home page, its Erol's selected links, and the Netscape browser, all create a unique Erol's-specific package, which includes content of value to subscribers distinct from other Internet Service Providers.¹⁶ In order to compete in today's marketplace Internet service providers must have content on their home pages to distinguish themselves from competitors and compete effectively.

The Commission has previously determined that regulating based on content level is not advisable. In the Phase II Order of Computer III, the Commission rejected a proposal for a new "change in information content" criterion for distinguishing between basic and enhanced services. The Commission found that "[t]he parties in this proceeding have already been able to identify certain ambiguities and potential gaps in this test: experience . . . would certainly reveal more of these." Amendment to Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), Phase II Order, CC Docket No. 85-229, 2 FCC Rcd 3072, 3077-3082 (1987); see also Second Computer Inquiry Final Decision, 77 FCC 2d 384, 417-423 (1981). These "ambiguities" and "potential gaps" still exist. The Commission should adhere to its previous conclusions that a content-based test is not tenable. . .

As AOL pointed out in its comments:

Although the Joint Board applied the label "non-content" to Internet access in determining that access rather than content should be subsidized, the Internet, by its very nature, is content. "Basic conduit access" to the Internet, as the Joint Board calls it, cannot be separated from the essence of the Internet itself, any more than access to broadcast television can be separated from television programming. Thus in the context of the Recommended Decision, it is a fiction to say that Internet access has a separate non-content identity. In reality, the Internet is nothing more than networked content.

¹⁵ Non-Accounting Safeguards at ¶ 104.

¹⁶ The creation of a pool of materials to be included on a home page is as much a "content" decision as actually creating an Internet database.

AOL Comments at 5; see also Netscape at 6. In addition, efforts to distinguish between content and non-content may also skew the competitive market for these services towards certain businesses that offer minimal content and thus violate the statutory charge that such rules be competitively neutral.¹⁷

The FCC previously rejected the invitation to start down the slippery slope of regulating content-based telecommunications services when it included protocol conversion in the definition of enhanced services. We urge the Commission not to enter this thicket of arbitrary line-drawing by attempting to create a "basic" Internet access service eligible for universal service subsidies for public institutions. We do, however, support subsidies for the basic telecommunications service link to the provider, which is consistent with the statutory language.

VI. Other Statutory Provisions Also Limit The Ability of ISPs to Receive USF Support.

The 1996 Act limits recipients of universal service support to "eligible telecommunications carriers designated under section 214(e)."¹⁸ Section 214(e) permits a "common carrier" to be designated as an eligible telecommunications carrier if they provide:

the services that are supported by Federal universal service support mechanisms under section 254(c) either using its own facilities or a combination of its own facilities and resale of another carrier's services. . . and . . . advertise the availability of such services and the charges therefor using media of general distribution.

In order to receive support, Internet Service Providers would have to comply with this provision by providing local telecommunications services designated as universal services under Section 254(c)(1) and obtaining state designation as an eligible telecommunications carriers. This process would require ISPs fundamentally to alter the nature of their businesses and accept more regulatory burdens, thus undermining the deregulatory goals of the Act.¹⁹

Some parties have suggested that providers that are not eligible telecommunications carriers may receive universal service support under Section 254(h)(2). While it is clear that

¹⁷ AOL Comments at 4-5; 47 U.S.C. § 254(h)(2).

¹⁸ Indeed only "telecommunications carriers" can provide universal service and receive reimbursement. 47 U.S.C. § 254(h)(1)(A) and (B).

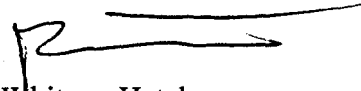
¹⁹ Pulling ISPs within the scope of the universal service fund would also undermine the Act. The Act itself specifically stated the policy of the United States is to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(2). By introducing subsidies into this competitive market, universal service may distort the market Congress sought to preserve.

Congress intended for telecommunications carriers of discounted services to schools and libraries to be entitled to support whether or not they are eligible telecommunications carriers,²⁰ Section 254(h)(2), which has been used as the basis for Internet access support, contains no provision, explicit or otherwise, exempting these providers from the eligible telecommunications carrier requirement of Section 254(e). Congress was clearly capable of carving out such an exemption in the previous paragraph. The absence of such an exemption in subsection (h)(2) therefore provides a definitive indication that Congress intended to subject these providers to the eligible telecommunications carrier provisions of subsection (e).

VII. CONCLUSION

Universal service goals can be most effectively secured by adhering to the clear language of the statute. Thus, schools and libraries would be entitled to reduced charges for the telecommunications services that support Internet access, but not the Internet service itself.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Whitney Hatch', with a long horizontal stroke extending to the right.

Whitney Hatch
Vice President - Regulatory Affairs

²⁰ Section 254(h)(1)(B)(ii) provides that telecommunications carriers providing discounted services under that paragraph shall “notwithstanding the provisions of subsection(e)of this section [setting out the eligible telecommunications carrier requirement], receive reimbursement utilizing the support mechanism to preserve and advance universal service.”